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by Irving Ben Cooper

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AMERICAN JUDICATURE SOCIETY • CHICAGO, ILLINOIS

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Vol. 38, No. 3

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GLENN R. WINTERS, *Editor*

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Come Up and See Us

BY THE TIME this issue reaches its readers, the move to Chicago will have been completed, and the Society will be occupying its quarters in the new American Bar Center building. Our offices are in the east end of the third floor of the north wing of the building, facing Sixtieth Street and the Midway. They consist of four rooms – a reception room, a private office for the secretary-treasurer, another for an assistant secretary, and a larger general office and file room.

The actual date of moving in was to be Tuesday, October 19. After that date, all mail for the Society should be addressed as follows: "American Judicature Society, 1155 East Sixtieth Street, Chicago 37, Illinois." Mail sent to Ann Arbor will, of course, be forwarded to the new address. Although we will have a connection with the American Bar Center telephone switchboard for calls within the building, we will have our own number for outside calls. That number is Midway 3-4818 (not 3-4522 as in a previous announcement), and calls for the Society or its staff from out of town or from Chicago outside of the building should be made to that number.

At this writing, purchase of furniture for the new offices had not been completed, and it was expected that temporary furniture would have to be used for some weeks. When the furnishing has finally been completed, photographs of the offices will be taken for publication in the JOURNAL. In the meantime, all of our members and friends are cordially invited to visit us there on their next trip to Chicago.

BETTER BRIEFS—BETTER LAW

Rule 13(A)2 and 6 is designed to gain for this court, at the beginning of the appellant's brief, an epitome of the case and its issues. It is not intended that detail should be incorporated in the statement of the case, and clearly nothing of a controversial nature should be inserted in the statement. Anyone performing appellate work, upon picking up an appellant's brief, is gratified when he finds at the very beginning of it a short passage which acquaints him with the case, the parties to the appeal, and designates in general the issues submitted to the court. . . . His basic purpose should be to introduce the case to the reviewing court and give a sufficient background of the challenged decree or judgment so that the reader can cope with the pages that follow. Brevity is highly desirable. . . . Argument and clarifying material must be reserved for later pages. In the preparation of the statement of the case, the attorney for the appellant should be for the time being a veritable *amicus curiae.* He should forget his client and center his full attention upon the seven members of this court. . . .

We now return to the case before us. The briefs, we believe, have gone beyond the requirements of Rule 13(A)2 and 6. With the exception of the one filed by the State, they include in the statement of the case reviews of evidence which are not contemplated by our rule. . . . Later, when the writer of the brief argues the assignments of error, he resorts again to some of the evidence which he included in the statement of the case. In this day of costly printing and multiplication of the number of appeals filed with the court, repetition is an evil.

The absence of citations to the record in the challenged part of the brief filed by the respondent Moran is a serious defect. The author of those pages states that the facts which they narrate are free from dispute. Without attempting to be exhaustive, we compared some of the statements in his brief with corresponding parts in the brief submitted by the appellants. In some instances the statements do not correspond. In will contest cases, nuances and inconsistencies, even though they do not amount to contradictions, are often important. . . .

We believe that it is best to deny the motion to strike and to postpone action upon the infraction of our rules until the time has come to tax costs. . . . In the meantime, we express the fond, but despairing, hope that the bar, before writing briefs, will give at least a glance at our rules. The sole purpose of our rules is to produce better briefs. We add that better briefs may yield better decisions and thereby in the end gain for the state better law. — *George Rossman, J., in Moran v. Bank of California, Oregon Advance Sheets, Vol. 58, p. 657, April 21, 1954.*

"ENGLISH, MORE ENGLISH"

Some years ago a member of our court was asked by a high school boy what subjects should be given special study by a young person preparing himself for the profession of the law. The judge replied, "There are three: first, English, second, more English, and, third, still more English." That there is some basis for this observation is indicated by the fact that in each of our bar examinations we receive answers containing sentences utterly innocent of either a subject or a predicate — from students who have been through the grade schools, high school, college and law school! Some months ago I chanced to

sit in a seat just back of two law students coming to Columbus on the train to take our bar examination. Their conversation was loud, and I learned a number of very interesting and some rather strange facts of life. Finally, one student said to the other, "I wish that somehow during my many years of schooling I had learned to express myself." To which the second law student replied, "Express yourself! Express yourself! I can't even spell!" Then ensued a discussion of our ultra-modern theories of education. It concluded with this pungent indictment, "We are supposed to learn to read and spell without learning the alphabet. Next they will attempt to teach us arithmetic without learning figures."

In conducting our bar examinations we are not astounded when we see periods and commas employed in the answers, but when we find proper paragraphing and the correct use of semicolons, we are inclined to think we may have unearthed a legal genius.

Newton D. Baker used to say that one reason English is difficult to learn is that it is a language without synonyms. Of course he knew he was overstating the case, but he was not incorrect in emphasizing the fact that each word does have its own shade of meaning.

But students are not alone in their difficulty. Legislators, practicing lawyers and even judges – even judges – have been known to share this difficulty. One day when our court was considering one of our many problems of statutory construction, a disgusted member volunteered the advice that we probably could save ourselves most of that work if we were to supply each member of each legislature with a copy of some good grammar. In our state the canon or rule of construction is not, what did the legislature intend to enact, but rather, what is the meaning of that which it did enact?

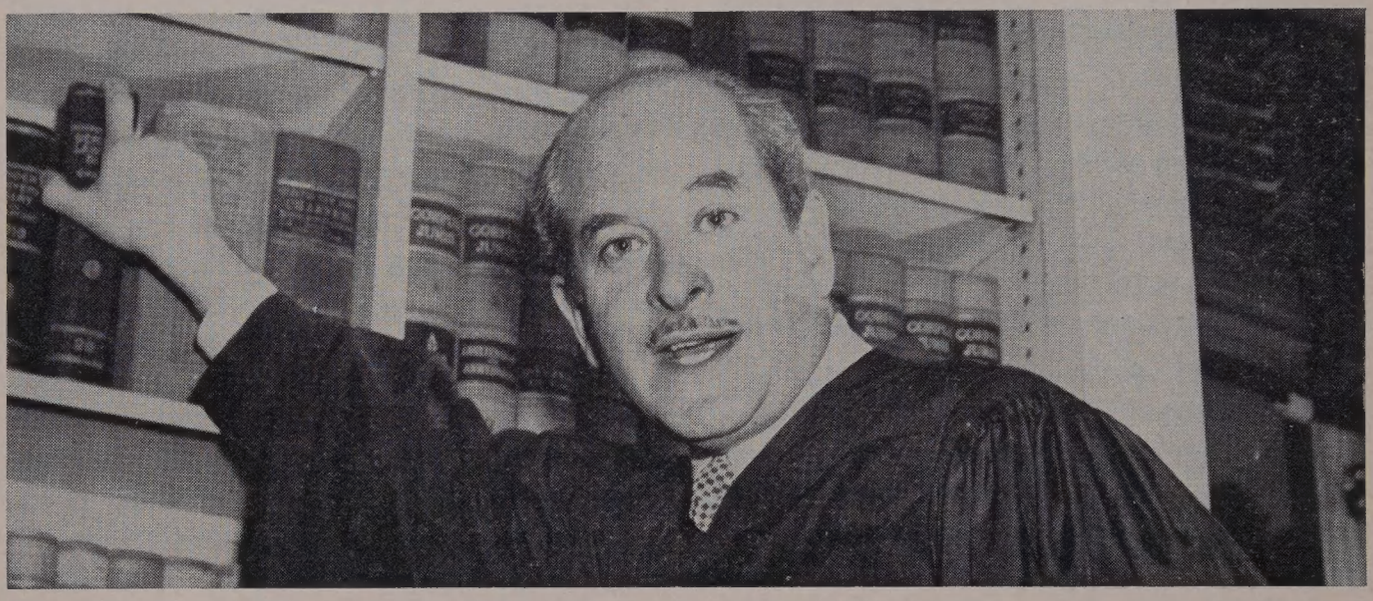
Even practicing lawyers seem to suffer an occasional linguistic lapse. A rural Ohio barrister was pleading a case in which his client sought to recover damages from a railroad for killing his cow. The peroration, according to the record, went thus: "If the train had been ran as it should have been, or if the whistle had been blew as it should have been, both of which they did neither, the cow would not have been injured when she was killed."

What about us judges? Recently while perusing a certain opinion, I discovered a sentence containing the conjunction "and" thirteen times. And what shall we say about long opinions, long paragraphs and long sentences? Years ago there was an old Ohio judge who used to say that in a legal document there is a law suit in every sentence containing more than twenty-five words.

Surely it is fair to say that anyone who has not learned the use of language and acquired the faculty of accuracy of expression should seek a field other than the law. – *Carl V. Weygandt, Chief Justice, Supreme Court of Ohio.*

Restoring the Juvenile Offender

By IRVING BEN COOPER



IRVING BEN COOPER is chief justice of the Court of Special Sessions of the City of New York. This article is a condensation of a portion of his last annual report.

SINCE the day of Cain and Abel, the juvenile offender has been with us. The biochemistry of youth is keyed to lust, violence, acquisitiveness, tempestuous and ill-considered action. Among the costs of carrying youth over the decade of transition from childhood into the beginning of responsible maturity is an incalculable mass of material and social wreckage – damaged and wrecked family cars, increased insurance rates, wanton destruction of household, commercial and community property, medical bills growing out of carelessness and foolhardy exploits, irresponsible pregnancies and births. Families, relatives, friends, neighbors absorb a major share of these costs. This situation is age-old and the community, in effect, has adapted itself. Crime is that one-eighth of the iceberg of human cussedness whose ravages are put down and added up in police and court records.

Youth offenses are the bud stage of criminality. They follow in the main patterns of adult desires. But they are less cerebral, less variegated and more lusty. Behind the burglaries, robberies, grand and petty larcenies, rapes and destruction of property, lurk the images of Robin Hood and Maid Marion. And deep in the heart of many an average mature citizen, walled off as an incipient tuberculosis by protective tissue,

are larcenies and felonies he fortunately escaped committing or being caught at red-handed. To consider youthful crime as something foisted on an innocent and law-abiding community rather than as an aspect of its own thought of itself and its own action is to be naive beyond sanity.

The Community's Attitude Toward Youth Crime

The public attitude and understanding of crime is about at the state that medicine was at the beginning of the 19th century. People still deny it in themselves, turn away from anyone accused or suspected, are wilfully ignorant of its varieties or treatments, and prefer to believe that it does not exist.

The community's attitude toward youthful offenders, like its treatment of youth generally, is a mixture of soft-heartedness, exasperation, wounded resignation and sadistic pleasure in punishment. Nowhere is the common failing of acting first and thinking afterwards more evident than in our handling of the social significance of youth crimes; that is, of how this transitional state between childhood and young manhood is being bridged. No responsible authority operates in this field. Once a complaint is issued against the young offender, the good forces about him shrink and evil forces are alerted. Those he has injured are outraged, the parents of susceptible children become fearful, the godly draw their garments around them, the evil-minded anxious for social support welcome a convert, the police close in on a quarry.

The young first offender is very aware that his act is not wholly atypical, and he draws a good deal of comfort from it. What the youthful offender needs at this stage is sound instruction about how much lawlessness the community will tolerate. He also needs to be shown the solid value of citizenship, of work, love, home, children, recreations. Most important of all, he must be put in the way of fitting himself to obtain them. The therapy needed by the young offender is guidance and oversight in actual community processes.

The community must understand that the youthful crime situation is serious in the sense that in a child diphtheria, poliomyelitis or smallpox is serious. The child needs all that can be done for him — isolation for a time, understanding treatment, a period of guarded convalescence. Some diseases require long periods of guided physical re-education — in the community. The young offender needs similar help.

The only authority for this kind of moral re-education in the community is the court. Once committed to a correctional institution, the youth has a new status. He is forever identified as belonging to a class. He will almost inevitably become indoctrinated with its folk lore. Its members will invariably exert pressures on him for their own purposes. Only in the degree that the court has the resources to decide which youths are good material for re-education in the community and what communities are sound enough in their standards, resources and temper to be able to handle the moral convalescents, can a real job be done.

The Slow Learners

Slow learners form an important proportion of youthful offenders. The slowness of their learning is emotional and moral rather than intellectual. They are not ready to repudiate the potential value which they saw in their offense as they planned it. They have heard that half of the reported crimes go unpunished and that less than 10 percent of crimes are reported. They are likely to have an extensive stock of instances of skulduggery perpetrated by the community's "most eminent" citizens. They have no illusions about adults, including judges and probation officials. They fear official power, but do not respect the source of that power nor the officers.

Despite a good deal of teaching to the contrary, morality is in important part "muscular." One learns to think by doing. The slow learner will not be convinced only by statistics about proportions of good men and women, and the availability of jobs,

recreation, straight-shooting and loyal pals and friends, honorary membership in community institutions and affairs. He must experience these values – and the invitations must meet him a little more than half way. He is easily rebuffed, easily scared off, easily bored, and eager for quick profits of this kind of ventures. Only as he is brought into relations of responsibility with people and institutions, and so gains a realistic acquaintance with actual social norms, can be start to build on his new evaluation of society.

The court must command his attention through the period required for him to revise his image of himself and to gain a working foothold in the community's life. This period of moral pump-priming has many ups and downs. The downs are frequently the the fault of the community – slurs, the overtures of old associates, difficulties of finding and being accepted by new associates, lack of ways to earn money with which to pay, rather than to beat, one's way. The court that through its probation department can carry a young first offender to the point where he is ready to meet life's challenges "on his own" has "saved a life." This kind of working on the foundation is not done cheaply. It costs blood and money. It very seldom costs as much as one year in a reform school or a penitentiary, surely a bargain in moral healing. Over-punishment is particularly useless in dealing with youth. Injuries or ineptitude in the treatment of youth offenders can easily miseducate an entire generation.

It is not impossible for a sentence to be a greater injustice than the criminal act. When a justice is beset by fear that a sentence he is about to impose cannot in the nature of things be apposite, his professional sense is outraged. What he wants to know is what kind of a person with what needs he is sentencing; and into what kind of an institution or community, with what resources and what hazards for moral recovery, he is committing him.

Today we speak less of punishment as retributive, as deterrent, or as regenerative. We are more aware that the sickness of the soul that brought about the crime is not to be properly treated by a given number of dollars in fines or of days in prison.

These are issues that face judges as they approach the fateful act of sentencing. After interminable hours of listening to charges and counter-charges, quibbling and evasions; painstaking establishments of self-evident facts; and the final officially-established legal description of an act, judges often find themselves merely at the beginning of what they should know in order to act professionally.

What judges want to know at this point is:

Why did he commit his act? Others about him, somewhat similarly placed, have not so acted. What was there in his experience to turn him criminal?

What of his home, his relations with parents, siblings and neighbors? With social institutions? With peer groups? With friends and boon companions?

Who has influenced him? After whom did he mould himself? What variety of activities did he participate in?

What has work, love, marriage, parenthood meant to him and how has he behaved in these relations?

Most important of all, what variety of opportunities was open to him? Did he participate in his culture and cherish it? Was he proud to be an American, a Jew, a Catholic, a Negro?

What interests does he now have? What skills? Whom does he love? Hate?

It is inadequate answers to these inquiries that pose the dilemmas of sentencing.

Re-Education In the Community

It must be faced: a significant measure of the blame for the situation in which the youthful defendant finds himself belongs to the community. He has been deprived of much: human interest, patience, the opening of doors closed when they should have been open, and open when they should have been

closed. The re-education process will now involve first a series of professional men and women, lawyers, judges, men of medicine, probation and other social service workers, recreation leaders and ultimately most important of all, the men and women of the community organizations in and through which he must establish his revised pattern of living.

The observations of the psychologist, the psychoanalyst and the psychiatrist will become matters of record and will be used in developing a group profile of a given disorder.

But even the best personality profile, with suggestions for therapy, is only as useful as the resources available to carry out its indications. We are at a stage where resources for description and diagnosis exceed resources for treatment. In a large number of cases, neither the delinquent nor the community has funds or other resources for treatment. And so both are heavy losers.

This is especially deplorable, for, aside from those cases where confinement to institutional care is advisable, most youthful offenders with good moral potential can be treated in the community – they are the "morally ambulatory," as it were. Their clinic is the court and its professional facilities, which will aid it in its socio-legal approach to the problems at hand.

The starting point in his reform – a revised picture of himself and of society – is (1) a new set of interpersonal relations and (2) a new orientation within the community; interpersonal relations with men and women who are morally positive, socially authoritative on the basis of achieved position and accomplish, warmly of feeling and expressing not only the intellectual interest of the average professional in a given situation, but personal human interest and concern for the given individual, the delinquent. I know from my experience that the attitude of a judge, and the relationship set up between defendant and court, followed through until the delinquent is discharged, can be of telling effect upon the progress of some youths.

The Delinquent Looks at Himself

A delinquent is usually very well aware that he has made a mess of at least one situation, and he suspects of others. The botched situation once was rosy with promise. But he can't live in it any longer; he must move on into another compelling dream. A famous Scotch divine once preached a very famous sermon entitled "The Expulsive Power of a New Affection." What the deliquent needs above all else is that "new affection." No one, least of all a disappointed delinquent, can desire forgiveness or crave "reinstatement" for more than a little while. What he wants is job status, a car, a sweetheart, wife, children, a house and garden. These dreams once lighted have a steady incandescence.

The probation officer, like the priest, teacher, doctor or lawyer is at best both symbol and practitioner. His art is to integrate individuals in society. He meets his client as a friendly ambassador to the social order, accepting him at his own evaluation. He points out the resources and explains the rules of the house. He arranges meetings, makes introductions, facilitates acceptance. The probation worker must be prepared to participate in recriminations and discouragements, in false starts, failures, hard ascents and periods of slow gain. He must see his client to the point where he can keep pace with his peers.

Community Moral Health

The health of the community lies in the absence of disease rather than in its resources for isolating the sick and providing for their cure. Crime is beginning to be understood as an aspect of man's mental-emotional-moral nature. This nature, assailed by many forces both within and without his bodily frame, is susceptible to many infections. Some are capable of destroying their victim, and, more important still, of infecting others. Public health authorities have learned to follow a typhoid or other "carrier" from state to state, even across the nation, once they have become aware of his existence. We follow the determined offender

through his fingerprints, but not the youth in his most infectious stage.

Juvenile crime is crime at the source. The youthful criminal may be self-infected; he has frequently been infected by another or he may have been conditioned by the mores of his gang or his neighborhood or even his family. He may even be so naive and unacquainted with morality as not to be aware of his entrance into the age of responsibility.

It is in the courts that the dramas behind the figures presented in the annual report of the Federal Bureau of Investigation, and in the local police reports on which the national profile is based, that the significance of these figures unfolds and takes on life. And it is from the court records that cities, towns and villages might, if they wish, learn what kind of crimes are committed, who are committing them, the conditions that breed or facilitate certain crimes, and the community phophylaxis called for to prevent (by promoting community moral health and so capacity to resist) evil temptations.

The Plea

Unfortunately for many courts, the law now provides the tool, but not the motor and the "juice" to run them. They have a half-where they should have a ten-horsepower motor. In other words, the law does not make it mandatory upon the community to provide the resources needed to make valid its instinct to help.

The pity of it is that there is ample good will in our states and cities to authorize the necessary appropriations. For it is not at all inaccurate to say that communities, like parents, are as yearningly afraid of youthful offenders as offenders are of them. The youth has not altogether repudiated the community, and the community has not altogether disowned him. Both are on the defensive. The youth needs assurance that he has worth and the power to compensate for his fault. The community needs assurance that the offender understands that he has been out of step and that he wants to get back into line. For the community, in the shape of the parents with adolescent children, is all too conscious of the narrow line that separates their own youngsters from the youthful lawbreaker. This insight can change their attitude toward the courts' functions and needs.

Not until our courts are adequately staffed with the professional skills pleaded for herein, will we be able to identify the youthful offender with good moral potential, who can be safely returned to the community to line up with the orderly citizen, from the hair-trigger, perverted or psychopathic first offender who needs institutionalized care. Yes, "possibilities of murder and desperate love are inside all the least likely skulls." As things stand now, the courts can do little to minimize recidivism; they cannot complete their mission with assurance.

These problems, these situations, this plea are succinctly summed up in two brief comments by two observers. They require no amplification. They constitute the challenge to all citizens who care. The first is contemporary testimony of a 19-year-old city boy:

> "Guys who don't feel like they're countin', who are being shoved around, who feel like they are worthless to everybody, well, they're the guys who go out and try to make names for themselves by being big stick-up guys. It's on account of they feel like they are nobody."

The other, by one of the greatest jurists of our land, former Associate Justice Benjamin N. Cardozo of the Supreme Court of the United States:

> "Run your eyes over the life history of a man sentenced to the chair. There, spread before you in all its inevitable sequency, is a story of the rake's progress more implacable than any that was ever painted by a Hogarth. The Correction School, the Reformatory, Sing Sing, or Dannemora, and then at last the chair. The heavy hand of doom was on his head from the beginning. The sin, in truth, is ours – the sin of a penal system that leaves the victim to his fate *when the course that he is going is written down so plainly. . . .*"

A Practicing Lawyer's View of Pre-Trial

By TRUMAN RUCKER

TRUMAN RUCKER is a member of the bar of Tulsa, Okla. He was a member of a panel in a program on the usefulness of pre-trial in cases involving insurance law, presented by the Section of Judicial Administration of the American Bar Association at the Atlanta regional convention. This article is based on his remarks on that occasion.

IT has been wisely said that "Courts are truth-seeking institutions."

If that be true, then every effort must be made by jurists and counsellors to see that every facility is given the courts to find the truth, and I think it could well be added that the courts likewise should be given the facilities to learn the truth expeditiously.

Recently, while in Washington and New York, I became associated with lawyers in litigation in some of the eastern states, and it is not only distressing but nearly impossible for me to believe that the courts in that area are four or five years behind on their dockets. It seems that the lawyers have given up in despair and have come to the conclusion that there is nothing that can be done about it. What pre-trials are held there are considered a waste of time, and so far apparently nothing has been done to speed up the disposition of litigation.

If we are going to survive as lawyers, practicing before common law courts and judges as we know them today, in contrast to appearance before bureaus, then we must do something about long and unnecessary delays.

The man that said "Justice delayed is justice denied," knew what he was talking about.

I mention these delays because it is the firm opinion of many great lawyers and judges, that pre-trials properly handled are a very necessary process in the expeditious disposition of litigation.

The very bulwark of the American system of life is based upon trials by juries and judges, but if the system that we have is not going to seek the truth in an expeditious

manner, then litigants of all types whether they be injured pedestrians seeking damages against the driver of an automobile, or business men seeking a solution of differences with other business men, will force the legislators of this country to furnish some type of bureau to adjudicate their differences.

Since pre-trial, with all the imperfections inherent in any human endeavor, can perform a function in expeditiously finding the truth, I respectfully assert that pre-trial, like matrimony, is here to stay, and we might as well make the most of it.

One of the objections is that pre-trial is nothing more or less than pressure to secure settlements.

Judges should not take this criticism lightly. Many lawyers feel that the judge exercises too much pressure on them to settle a lawsuit. This, by all means, should not be done. This is not the purpose of pre-trial. Yet, isn't it true that with or without pre-trials, if the judge wants to exercise whatever powers he has to try to pressure a settlement, he can do so? So that is nothing wrong with the pre-trial system, it is just a trait of the judge.

Another objection is that everything done in a pre-trial can be done in a few minutes before trial starts. Of course this is true. Therefore, it might be contended that the pre-trial should be held only a few minutes before the trial of the lawsuit. Of course this absurdity answers itself, for it is generally agreed a pre-trial held within ten days of trial does not give the lawyers enough time to secure all evidence and prepare for trial.

I am intrigued by the argument that the only way you can have a successful pre-trial is with a judge who is endowed with the proper balance in his personality. In other words, a most unusual character. After all, judges are merely ordinary human beings, with all the abilities and frailties of human nature. They are neither more nor less intelligent, honest, and courageous as judges than they were as attorneys. A few people think that the moment some judge takes the oath of office, the Lord endows him with an ability a hundred times greater than he had a moment before, and he has suddenly become possessed of the intellectual ability to know more about a lawsuit after five minutes of study, than the poor, average, hard-working lawyer who has spent six months in its preparation. This is utterly erroneous. We cannot expect judges, either federal or state, to be utterly lacking in any imperfections, or to handle anything, including pre-trials, without making an occasional mistake. If a judge is good enough to try a lawsuit, he is good enough to hold a pre-trial. There is no reason to suppose that it takes a genius to conduct a pre-trial.

It must be remembered that advocates will forever remain advocates, and if they did not have qualities of aggressiveness and an earnest desire that their client prevail, they would lose their value as advocates. I heard a young lawyer, after listening at length at a bar meeting to the older lawyers extolling the virtues of ethics and proclaiming that everybody should be interested in seeing that justice prevails in every case, irrespective of whether they were the victors or the losers, speak in substance as follows: "I shall leave it to the older, fatter, and wealthier attorneys to discuss the proper administration of justice. As far as I am concerned, I am going to use every legitimate and honorable means at my command to see that my client prevails in all litigation in which I represent him."

Therefore, in order to have a successful pre-trial, the judge must have not only the authority, but also the desire to use the authority, to see that the parties are fair with each other. It is often true in some courts that the parties appear at the pre-trial with the desire to get as much information as they can from the opposing party and give as little as they can. Fortunately, in federal courts with the power inherent in the trial judge, this rarely if ever occurs.

The judge is the man that will determine the success or failure of a pre-trial hearing, and it is therefore incumbent that not only the lawyers, but more particularly the judges,

be educated upon not only the method of pre-trial, but the value of it.

It would be far too presumptuous for me to indicate any post-graduate course a judge should take, for I have enough trouble with judges as it is without being designated as a lawyer who suggested that judges should have a little more education.

But, as far as attorneys are concerned, I believe that by institutes that are held in various parts of the country, such as the Law-Science Institute sponsored by the University of Texas, and which regularly meets in places such as San Francisco, Los Angeles, Chicago, and New York, and educational programs presented at county, state and American Bar meetings, that lawyers can be sold on the value of pre-trials. After all, let us not forget that lawyers are essentially advocates. They want their client to win his lawsuit. Yet they realize we must maintain our system of jurisprudence.

One of the finest places to start lawyers thinking along those lines is in law school. The man who said it is difficult to teach old dogs new tricks realized that a habit or custom once formed, or a practice followed over a number of years is difficult to change. This is no particular criticism of the older judges or the older lawyers, but a fundamental fact of life.

Therefore, let the law students be impressed with the idea that pre-trial will facilitate an expeditious and honorable termination of litigation, and should become a constantly-used arm of our judicial system.

Pre-Trial Practice and Procedure in Bankruptcy Hearings

By IRWIN KURTZ

IN THE twenty-two years that I have been a referee I have operated on the principle that next to war, litigation is the largest single item of preventable waste. If the aggregate loss to the nation through the necessity of referring to courts the trial of disputes arising in business transactions could be computed accurately it would stagger the imagination.

Believing in the necessity of adjusting differences, if possible, or, if not, shortening the trial of issues, I have been carrying out a set of practices since I have been a referee.

I realize that there are some who feel that it is not the primary duty of the courts to settle cases, rather it is their duty to hear evidence; they also feel that it is not the function of the courts to aid the parties in consummating settlements, but with this line of thinking I strongly disagree. I feel that the interests of all litigants are furthered by effecting settlements and relieving overburdened and delayed calendars.

I have made it a rule that all motion papers are to be filed in my office at least two days before a hearing, and that answering affidavits or an answer be also filed at the same time. This gives me an opportunity to find out in advance of hearing what all the shooting is about, and to find out what are the

IRWIN KURTZ is referee in bankruptcy in the Southern District of New York. This was a paper prepared by him for delivery at the 1954 convention of the National Association of Referees in Bankruptcy in Milwaukee, and appears here by courtesy of the JOURNAL of that Association.

real differences. This method also gives me an opportunity to examine into the law on the issues.

On the day that the matter first appears on my calendar I inquire whether any steps have been taken to adjust the matter. If no steps have been taken, I suggest that both attorneys appear with their clients on an adjourned date so that we can boil down the issues and, if possible, adjust the matter. I insist that principals be present because I have found that if the lawyers have to report back to the parties involved in the matter, it often results in a lack of agreement.

If the attorneys for the trustee have full authority to act for their client, it is not necessary for the trustee to be present but if the matter at issue is important and there is a committee, I request that they be present either by an authorized representative or by a majority of the committee. I announce that there will be no trial of the issues on the day of this hearing and if necessary I will fix a date for the trial at the conclusion of the conference.

Informal Conferences

I usually hold these conferences around a large table in my chambers. I think it is a mistake for the referee to conduct them in the court-room from the bench. Many laymen and some lawyers are awed by a judicial officer, even though he is not robed, and, therefore, will not talk freely.

When the parties are all assembled I inform them that they can smoke, if they desire. Even though I have never smoked myself, I find that smoking has the effect of quieting the nerves of many people, and creates a more relaxed atmosphere. I carry the ball from the inception of the conference.

If the matter is one that involves a small amount of money, I observe that it appears to me that this question can be aptly described by an old farmer's expression "This is more harness than horse." I then remark that the only sure thing in litigation is the expense, and then I observe that some wise man in the dim past has said that "litigation is a machine in which you go in a pig and come out a sausage."

We then proceed in an informal manner to discuss the issues of fact involved. I try to avoid discussing the issues of law as much as possible, because if the lawyers enter into such a discussion, there will be no end to it. I point out the expense of the litigation, the stenographer's minutes, fee on petition to review, the cost of possible appeal to the circuit court and additional counsel fees. I listen patiently to the comments of lawyers and laymen and I then read them an excerpt from one of Winston Churchill's books wherein he summed up the subject in these eloquent words:

> "Thus we had arrived at those broad happy uplands where everything is settled for the greatest good of the greatest number by the common sense of most after the consultation of all."

After I have let all the parties discuss all their differences and we are down to the point where at my suggestion, the trustee's attorney states the amount he would recommend, and the respondent states his position, I inquire whether both parties will agree that I should act as arbitrator. I stress at this point that I will not be offended if this offer to arbitrate is rejected. I tell them if the offer is accepted, I will fix the amount and both parties must abide by my decision with no right of appeal. I then state a definition of a compromise, as follows: "A deal in which two people get what neither of them wanted."

In my long experience along these lines I have had a tremendous percentage of successful terminations. It is a very rare occasion indeed when both parties do not consent to my proposal.

All of the above procedure is without a record being taken.

When the parties agree to my suggested arbitration I send for my reporter. I dictate the appearances, a short statement of the matter in dispute, and a statement that both sides have agreed to accept my decision as arbitrator.

I then pause and place upon the record that I have correctly stated the agreement of all the parties, I then announce my decision and direct that an order be entered in accordance therewith. I have found it necessary to make an immediate decision while the parties are in a concilatory mood, in other words, strike while the iron is hot.

By the above procedure I have saved countless hours of trials, saved creditors a tremendous number of dollars, and myself countless headaches.

Handling of Discharges

Along this line of discussion, I believe my method of handling discharges will be of interest. I wait until I have a number of cases ready for discharge. I then fix a date which will be the last day for filing of specifications in all the cases involved. My office sends out the required notices to creditors, and when the day comes I hold a regular calendar call.

These discharge calendars are attended by many layman creditors and lawyers who are not familiar with the bankruptcy practice.

I deliver a fifteen minute lecture defining the purpose of bankruptcy, to give an honest bankrupt the right to cast aside the burden of his debts. I inform them that specifications must be within the frame-work of Section 14. I couch my entire address in non-legal language. I point out that the mere fact that they will receive nothing on their debts is not a ground for opposing a discharge. I point out that under the decisions in the Second Circuit, the question as to whether or not a debt is dischargeable under Section 17 is not a ground for filing a specification, but that question must be determined in the State courts after a bankrupt's discharge.

I point out that the commission of a crime other than under the bankruptcy act is not a bar to a discharge. I inform them as to the expense of filing specifications, such as filing fee to clerk, necessity for making a deposit for reporter's minutes. I then ask for questions and try to answer them, and then proceed to call the calendar.

By the method set forth above I have found that many less specifications are filed because some objectors are convinced that contemplated specifications could not possibly be sustained.

If specifications are filed on the call, I examine them, and if they are improper, I hear arguments, including motions to dismiss. Some specifications are based solely on the fact that a creditor's dischargeable debt has not been paid.

If specifications are filed containing a number of separate specifications, at the time of the trial I call attorneys up to the bench. I point out that if I sustain one specification it bars bankrupt's discharge just as surely as if there was proof on other specifications, and I suggest a stipulation be agreed to on the record. This will provide that the party filing the specifications shall elect to proceed to try one of them. If he succeeds on that one, that the order denying the discharge shall provide that in the event of an appeal and reversal he shall be permitted to come back and try any or all of the other specifications.

While this method might seem to be taking too many bites of the same apple, most of these trials involve merely questions of fact. The General Orders provide that the District Judge shall not reverse the referee who has seen the witnesses and judged their credibility, unless his findings are clearly erroneous. See General Order 47.

If the evidence on the first specification is not sustained, the moving party can proceed to try another specification until either one is sustained or all are found not a bar to the discharge.

This method has greatly diminished the length of these trials and saved many dollars of reporters' bills.

I have been using this method on trials of specifications for many years, and I can recall just one case where the judge reversed my findings and sent the case back for a trial on the other specifications.

A Pre-Trial Statement

IRA W. JAYNE is presiding judge of the Wayne County Circuit Court, Detroit, and is regarded as the originator of pre-trial in its present-day form and application.

THE following pre-trial statement of an actual case heard before the Honorable Ira W. Jayne, circuit judge, Wayne County (Detroit), Michigan, on April 8, 1954, vividly portrays what can be done toward saving the time of court and counsel by effective use of pre-trial with cooperation of the attorneys:

This lawsuit is a so-called passenger case against the Department of Street Railways.

At the pre-trial hearing, counsel stipulate that the plaintiff was a paying passenger on one of the vehicles owned and operated by the defendant.

They further stipulate that on the 19th day of December, 1951, at about 11:45 p.m., while the defendant was operating one of its electric trolley buses in a northwesterly direction on Grand River Avenue in the City of Detroit near the intersection with Pinehurst, that the plaintiff fell while a passenger in the bus somewhere between the time he boarded the bus at the intersection of Pinehurst and Lesure.

The plaintiff contends that the cause of his fall and resultant injury was the negligent conduct of the driver of the vehicle, which the defendant denies, which raises the principal issue of law and fact for the trial court.

Pre-trial Exhibit A is a statement of Dr. Alvis D. Finch, which the parties stipulate shall be received in evidence in lieu of his appearance as a witness, it being what the doctor would testify to if he did appear.

Counsel further stipulate that the following bills were incurred as a result of this accident and that their reasonableness is admitted if the defendant is held liable on the main issue: Receiving Hospital, $34.00. Mt. Carmel Hospital, $330.05. Dr. Finch, $150.00.

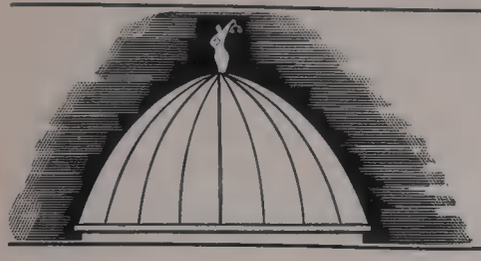
Pre-trial Exhibit B is stipulated to be a report of the United States Weather Bureau of the day in question.

It is further stipulated that the plaintiff is an employee of the New York Central Railroad and that the records of his employer show that in November, 1951, he earned $464; in December, $344; that he was unemployed January, February, March and April; in May he returned to work and earned $300; and in June he went back at his full pay.

Counsel further stipulate that the plaintiff has made a full recovery and there is no claim for permanent disability in his measure of damages.

Jury has been demanded.

Probably take a day to try.



Judicial Administration Legislative Summary

Organization of Courts

A recommendation for a complete redraft of the judicial section of the Florida State constitution is being considered by the State Judicial Council. The council, consisting of nine laymen and eight lawyers, was created by the 1953 state legislature to conduct a continuing study of the state's judicial system, and is headed by Supreme Court Justice Elwyn Thomas. In its first annual report the council revealed it had decided to draw up a complete revision of the state's basic judicial laws and also to draft a new constitutional section pertaining to methods of appealing cases from one court to another. Which plan of several will eventually be recommended to the legislature has not yet been decided.

Comprehensive reorganization of the entire court system in Texas was proposed by the special constitutional revision committee of the state bar in a report prepared for submission to the bar's annual meeting. The plan envisions consolidation of the court of criminal appeals and the state supreme court into a powerful new state supreme court with broad administrative powers. Some courts, including justice of the peace courts, might be abolished. Judges for district and county courts – which the supreme court could create or eliminate as it believed the need existed – would be elected for six-year terms. The state supreme court would be the judicial, executive and administrative head of the state's entire court system. To expedite administrative functions, the supreme court would have authority to create the office of administrative director with an adequate staff and facilities.

A grand jury report handed up in Baltimore recommended the creation there of a new Court of Family Relations to cope with the increasing and related problems of broken homes and juvenile delinquency. Emphasizing the need for a "family court," the jury said the increasing delinquency of minors had brought "the whole question of family instability in Baltimore into sharp focus."

Recorder's judges in Detroit (Michigan) went on record at their monthly meeting in September as favoring the establishment of a youth court as a division of the present court. The judges followed up their unanimous vote with the appointment of Judge W. McKay Skillman as chairman of a committee to study a youth court. Judge Skillman told the monthly judges' meeting that a youth court, separating young offenders from adult criminals, would present a more positive approach to the problem of youthful crime. He said he would name another judge to study a youth court in Baltimore, which could serve as a model for a Detroit Court.

A proposed state constitutional amendment being submitted to the Minnesota electorate in November to permit the state legislature to create special juvenile courts has been endorsed by the Minnesota Juvenile Court Judges Association. A similar ballot proposal was defeated in 1952. Under present state constitutional limitations, juvenile cases are handled by district court judges in the Twin Cities and Duluth. In other areas they are handled by probate court judges.

Louisiana's legislature approved for submission to the voters in November a proposed state constitutional amendment to permit the establishment of a "family court" within the 19th judicial district framework in Baton Rouge. Similar to children's courts now functioning in Shreveport and New Orleans, the proposed new court would have jurisdiction over all suits, except capital

crimes, involving minors under 17, and also cases of adoption, divorces, separation, desertion and non-support. The bill, which was sponsored by the Baton Rouge delegation, calls for one judge possessing the same qualifications as a district judge and elected for the same term.

Failing of enactment in the now-adjourned Massachusetts legislature were bills backed by Governor Herter to create a nine-court juvenile circuit system and to reorganize the district court system in the state by designation of 37 full-time courts with 43 full-time judges. The proposed district court system reorganization was rejected after last-minute criticism from Norman MacDonald, executive director of the Massachusetts Taxpayers Association, who said "it fell far short of requirements for a fair and equitable reorganization of the state's lower court system." The proposal was ordered to a study by a recess commission.

Governor Shivers has announced that he will urge the 1955 Texas legislature to create a state board for redistricting courts and Congressional seats. Texas district courts, now totaling more than 130, have never been revised, despite repeated suggestions that it be done. Study committees have found that some courts have too much work while others have much idle time.

Criminal Justice Study

As a result of a recommendation of the Judicial Conference last June New Jersey's Supreme Court appointed State Attorney General Grover C. Richman, Jr., to serve as chairman of a special committee for the improvement of the administration of criminal justice in that state. The Conference found that one of the principal difficulties is a division of responsibility for law enforcement among numerous government agencies.

Judicial Selection

A plan to exempt California superior and municipal court judges from going on the ballot for reelection unless specific opposition developed against them has been suggested by Assemblyman Charles J. Conrad, who heads the Assembly committee on elections and reapportionment. Mr. Conrad announced that he intends to introduce a state constitutional amendment along those lines in the 1955 state legislative session. He states that this will in no way prevent any qualified individual from running for these judgeships who files nomination papers in the regular manner.

Judicial Salaries

A bill to increase the salaries of justices of the Supreme Court of New Jersey, the Superior Court and county court judges in counties with more than one judge was given final passage by the legislature and sent to the governor for signature. Under the bill, the chief justice's salary will go from $25,000 to $27,500; the associate justices will be raised from $24,000 to $26,500; Superior Court judges will move from $20,000 to $22,500, and county judges in counties with more than one judge will get a boost from $16,000 to $18,500.

In our June issue we stated that a bill to increase the salaries of the nine justices of the Mississippi Supreme Court was defeated. To the contrary, that bill was approved by the governor and became effective July 1st. The chief justice's salary has been raised from $11,000 to $13,500 and the justices from $11,000 to $12,500. Governor White also signed into law a measure enacted by a special state legislative session to increase the salaries of circuit and chancery judges from $7,500 to $9,000 a year.

Michigan Attorney General Frank G. Millard has ruled that the state may not reduce the salary of circuit judges if a county raises the judges above the $22,500 combined state-county total fixed by the state legislation. A measure enacted by the 1950 legislature increased circuit judges' state salaries from $9,000 a year to $12,500, with the proviso that the counties where the judges sit may not pay the judges more than $10,000 additional.

Despite a last minute effort to get a Senate vote on the Judicial-Congressional Salary Bill at the recently adjourned session of Congress, the bill was not brought on for vote in either the Senate or the House during the 83rd Congress. The salary increase bill is to

be brought up for vote early in the session convening in January, 1955.

Retirement of Judges

The Judiciary Committee of the House of Representatives killed a proposed constitutional amendment that would fix the size of the Supreme Court at nine members and require the justices to retire at the age of 75. The vote was 11 to 8. In May the Senate approved the proposal 59 to 19. One reason for "tabling" the proposed amendment was that the questions involved were deemed too far-reaching for hasty consideration during the drive to adjourn Congress. House Bill No. 28 which establishes a retirement program for Kentucky circuit judges was enacted into law to become effective last July 1st. Under the bill a person who has reached his sixtieth birthday, has had ten years service prior to the effective date of the bill and who has contributed for a minimum of two years to the special fund shall be eligible for compensation. Each judge will be paid $3,500 plus $150 for each year of service in excess of ten years, provided that the number of years of service to be used in computing the compensation payable shall not exceed twenty. Each circuit judge shall contribute into the retirement fund an amount equal to two percent of his annual salary.

Miscellaneous

A bill sponsored by the Judicial Council of Kentucky was enacted into law recently which made some long needed changes in the qualification and selection of jurors in that state.

A move to ask the next session of the Wisconsin legislature to authorize an increase in district court fees in Milwaukee was approved by the Milwaukee Common Council. Legislation to put the higher fees into effect will be drafted by the Milwaukee city attorney's office for introduction in the 1955 state legislature.

The 1954 session of the Mississippi legislature enacted the Uniform Reciprocal Enforcement of Support Act. With the approval of this act by the governor, forty-seven states have adopted reciprocal support laws.

Bench and Bar Calendar

October

21-22—Nebraska State Bar Association, Omaha.
22 —North Carolina State Bar, Raleigh.

November

7-10—National Municipal League, Kansas City, Mo.
10-13—National Legal Aid Conference, New Orleans, La.
17-20—Oklahoma Bar Association, Tulsa.

December

4 —Second Annual Conference on the Natural Law, Guild of Catholic Lawyers, New York, N. Y.

January, 1955

19-21—Pennsylvania Bar Association, Pittsburgh.
24-28—Traffic Institute, University of California, Berkeley, Calif.
26-29—New York State Bar Association, New York City.

February

17-19—Indiana State Bar Association, Indianapolis.
21-22—A.B.A. House of Delegates Mid-Year Meeting, Chicago, Ill.

April

13-16—A.B.A. regional meeting, Phoenix, Ariz.

May

19-21—Bar Association of the State of Kansas, Hutchinson.

June

8-11—A.B.A. regional meeting, Cincinnati, Ohio.
27-30—Pennsylvania Bar Association, Bedford Springs.

July

21-23—Alabama State Bar, Mobile.

August

22-26—American Bar Association, Philadelphia, Pa.

November

27-30—A.B.A. regional meeting, New Orleans, La.

Is Your Association Using Its Past Presidents?

Mr. T. J. Byrne of Prescott, Arizona, past president of the State Bar of Arizona, writes that that organization is in the process of determining whether or not past presidents shall be put out to pasture, or assigned some activity which will not endanger high blood pressure. In that connection, Mr. Byrne has compiled the following useful summary of the practices of all the state bar associations relating to their past presidents.

From this table it appears that in twenty-one of the states nothing specific is done to recognize or utilize the past presidents. In a dozen more they only get together once a year to enjoy each other's company.

In Michigan, Nebraska and Rhode Island this reunion is held along with the members of the current governing board, and although it is primarily a social occasion there is no doubt opportunity for exchange of ideas. In Delaware and Michigan the president in power has gone a little farther and give specific assignments to past presidents.

Systematic utilization of the experience and know-how of past presidents is provided for in the organization or settled practices of the rest of the state bar associations. In Minnesota and New Jersey the immediate past president is a member of the governing board, and we think the same is true of some more of the states which did not so report. In Washington the immediate past president becomes chairman of an important standing committee. In Ohio, Pennsylvania and Texas, the past presidents as a group are regularly given important responsibilities.

Finally, in Illinois, Maryland, Massachusetts, New York and Oklahoma, the past presidents are automatically members of the organization's governing house or board, in some instances with, and in some instances without, vote. All past presidents of the American Bar Association are full voting members of its House of Delegates for life.

Perhaps the most important step in recent years toward making adequate use of past presidents of bar associations has been the establishment about five years ago of the nation-wide Conference of Bar Association Presidents and the subsequent setting up of similar state-wide organizations within many of the states. Although nominally organizations of presidents, actually the current presidents are too busy with the affairs of their organizations to devote much of their time to the conferences, and their activities are largely carried on by past presidents. This is of great benefit to the active presidents, and they, in turn, are enabled to pass on the benefit of their experience to their successors.

STATUS OF PAST PRESIDENTS OF STATE BAR ASSOCIATIONS

Alabama – No organization. Breakfast for past presidents at annual meeting.

Arizona – No organization. Dinner for past presidents at annual meeting.

Arkansas – No organization, no activity.

California – No organization, no activity.

Colorado – No organization. Practice at annual meeting for a past president in rotation to give cocktail and dinner party.

Connecticut – No organization, no activity.

Delaware – No organization. Present president has appointed five past presidents as an executive committee to advise on association matters.

Florida – No organization, no activity.

Georgia – No organization, no activity.

Idaho – No organization, no activity.

Illinois – Provision in by-laws that all past presidents are members of governing board for life without voting power.

Indiana – Last five presidents serve in Scope and Correlation Committee, which meets with Board of Management to give benefit of their experience and advice.

Iowa – No organization, no activity.

Kansas — No organization. Past presidents and wives have dinner at annual meeting.

Kentucky — No organization. Have a breakfast at annual meeting.

Louisiana — No organization, no activity.

Maine — No organization, no activity.

Maryland — No organization. Past presidents maintain deep interest in association activities. They are members of Executive Council, which is charged with running business of Association between its general and special meetings.

Massachusetts — No organization. Past presidents are ex-officio members of Board of Delegates.

Michigan — No organization. Many past presidents attend dinner of Commissioners at conclusion of annual meeting given in honor of the retiring president. During past two years, a blue ribbon committee of six past presidents studied federal judicial manpower.

Minnesota — No organization. Executive Committee is composed of four elected officers, plus the immediate past president, who also serves for two years after his term expires, on Board of Governors.

Mississippi — Past presidents have a breakfast at annual meeting. Several years ago drew up some by-laws whereby the oldest member became president and youngest became the secretary.

Missouri — No organization, no activity.

Montana — No organization, no activity.

Nebraska — No organization. Incumbent president invites all past presidents, officers and members of Executive Council, to a dinner on day preceding annual meeting.

New Hampshire — No organization, no activity.

New Jersey — Immediate past president is member of Board of Trustees. All past presidents are members of General Council.

Nevada — No organization, no activity.

New Mexico — No formal organization. A past presidents club was formed two years ago, the activities of which have been confined to a luncheon during annual meeting.

New York — No organization. Past presidents to continue on Executive Committee.

North Carolina — No organization, no activity.

North Dakota — No organization, no activity.

Ohio — No organization. Past presidents, along with present members of Executive Committee, constitute the trustees and members of the Ohio State Bar Association Foundation, which holds at least one formal meeting each year, in connection with annual meeting of state bar association. They are also members of an informal group known as the Executive Committee Alumni.

Oklahoma — No organization. Past presidents are members of Bar House of Delegates.

Oregon — No organization. Hold annual no-host dinner on the evening before annual meeting of bar, wives being invited.

Pennsylvania — No organization. Past presidents act as nominating committee of Association under chairmanship of immediate past president. They act informally as a group of "elder statesmen" and have, in past, made many excellent suggestions in connection with work of association.

Rhode Island — No organization. For past four years, Executive Committee has held a yearly dinner meeting with past presidents.

South Carolina — No organization, no activity.

South Dakota — No organization, no activity.

Tennessee — No organization, no activity.

Texas — No organization. Loosely associated together on informal basis. Past presidents are considered as members of Ex-Directors' Association, which gets together at annual convention for cocktail party. It is customary for past president in the convention city to give a breakfast for past presidents during the convention.

Utah — No organization, no activity.

Vermont — No organization, no activity.

Virginia — No organization, no activity.

Washington — No organization. At end of president's one-year term, he is appointed chairman of the Committee on Ethics.

(Continued on page 92)

"He Saw The Witnesses"

By WILLIAM M. BLATT

When there is an appeal in an equity case or in certain other matters the appellate court frequently, indeed usually dismisses the appeal with the cliche, "We cannot say that the lower court judge was clearly wrong. He saw the witnesses." Then follows an equally trite sentence explaining that since the lower court saw and heard the witnesses it was in a better position to pass upon the reliability of the testimony.

It may come as a shock to some of the older lawyers to be informed that modern science regards seeing the witnesses and hearing them as very little, if any, help in determining their veracity. That expert criminologist, William Shakespeare, makes Duncan say, "There is no art to tell the mind's construction in the face." And the psychologists agree with him. A "shifty eye" usually means nothing but shyness. A restless manner is simply a restless manner. Hesitation indicates, as often as not, an effort to be accurate. An "evil look" is what you see on the faces of Socrates, Darwin, and a large proportion of myopic or cross-eyed professors of law and other subjects who are relatively harmless.

Experienced and skillful advocates will tell you that they have special ways of spotting a perjurer, but upon cross-examination it will be found that they actually base their opinion on testimony. Max Steuer said in an interview that when a witness rubs his upper lip he is lying. Obviously this is an unsafe generalization. If a judge or referee reported that he was guided by any such formula he would be promptly and properly reversed. And so with toe-wiggling (in India), "turning pale", "hemming and hawing", and other old wives' tales. Anyone who has tried cases, on the other hand, knows that a witness who looks you straight in the face and talks in a clear, even voice may be a congenital prevaricator. Foreign countries do not apparently share our belief in the importance of seeing and hearing the witness. I have seen cases tried on appeal in Italy and France in which the written record was read in open court to the judges and promptly reversed by them.

Prevaricators are spotted by judges and juries by self-contradiction and inconsistency but not by their voices or appearances. Examples: insistence on a speed of ten miles an hour in a head-on collision case; drinking only two beers (the usual admission) in an arrest for drunken driving; long periods in bed following slight contusions; insistence that the witness was on the right side of the road notwithstanding long skidmarks on the left made by the car he was driving; statements by both plaintiff and defendant that each was in the intersection before the other though one car was damaged on the side and the other in front; testimony differing essentially from written statements by the same witness made just after the accident. And so on ad infinitum. These are the real bases for disbelief. And these are in the record for the reviewing court to read. Sometimes the contradictions are absurdly incredible – de-

scriptions of objects which never existed, such as lights and cross-walks and side streets, observation through brick walls or in pitch darkness, identification of people at great distances and for only seconds or seen from the rear or from above. These are numerous, and again are clear in the record, sometimes clearer than in the court-room.

One suspects that refusal to reverse on the ground that the lower court judge was confronted by the witnesses is only a convenient formula for distrust of the whole process. Review of facts from the printed record lacks the drama which in turn creates the alertness of a judge or jury at a real trial. Reading a record is tedious. The reader may grow weary and overlook points. The highlights are not obvious, emphasis does not exist, and this adds to the tedium and subtracts from the attention. These objections may be overcome by extra effort and stimulus but at best it is an unpleasant and time-consuming chore and one which the upper court is tempted to discourage and avoid.

Fifty years ago many cases were appealed on the facts to a higher tribunal and retried. Today most of these appeals have been eliminated. Where there is a trial without jury, the right to appeal to a jury is prevented in some states by making the non-jury trial an election and a waiver. Logical enough, to be sure, but logic is not enough. There is the question of justice. Is the right to appeal on the facts an essential of justice?

That it is may be suggested by the reluctance of legislatures to deprive a defendant of a jury trial in criminal cases even though he has had a hearing before a judge. He can, of course, waive jury, even in felony. But what state insists that he can waive it by submitting to trial in a lower court? I know of none. Curiously he can waive jury in the upper court usually, except in murder trials, yet grave doubts have been expressed by high authorities on the validity of such waiver.

In civil cases juries are easily waived. Indeed they are often, in some states, always and conclusively waived unless claimed in time, and in either case only one trial is allowed, unless the judgment is reversed for error of law. In certain special matters (probate, equity) an appeal on the printed record is sometimes permitted, but we come back to my opening statement that such an appeal is not much more than a futile gesture. In Massachusetts a true reversal of a finding of fact in the record of a lower court does not, so far as I could find, exist.

Here we have, I believe, one of those subtle changes in the pattern of the law which partly destroys the original design, not merely in detail but in the symmetry of the whole scheme. For the appeal is an ancient primal element of justice. It is a recognition of the fact that any finding is liable to be faulty. The tribunal, judge or jury, may have been swayed by local prejudices, personal policies, forgetfulness, bad reasoning, misapplications of the law which do not appear of record, but most of all by slovently, imperfect, unskillful or incomplete presentation of the evidence by counsel. The last danger (incomplete evidence) is recognized by the rule allowing a retrial for newly discovered evidence, but all the others are equally common and result in similar paralysis of justice. In ancient days the appeal was to a higher and more powerful tribunal, one not afraid to ignore precedent or to act boldly. The king and the chancellor were the final authorities and they stood ready to hear cases. Today hard cases go the way of other cases whether the hardness be of fact or of law. "Hard cases make shipwreck of principles", but they also make shipwreck of justice.

The remedy? TWO TRIALS when either of the parties wants them. The objections? Expense, strain, duplication of effort and loss of time. Not necessarily, as will be seen below. Even if it were true, a closer approximation to an equitable result would be worth the sacrifices. In the second trial an unforeseen piece of evidence, perhaps fabricated, which appeared in the first trial can be discredited by other evidence obtained during the hiatus before the second trial. Local and personal leanings can be neutralized. Even

honest and intelligent judges have such leanings, conscious or unconscious, and jurors more so. Some are truculently political. Some make snap judgments. Some are narrow about certain groups. Some are pro-labor at heart, some are pro-employer, and their conclusions of fact are slanted. To err, as someone has said, is human. To admit it, as some one else has said, "ain't".

But is it certain that the two permitted trials would take more time and cost more than one? Believe it or not there is evidence to the contrary. In Massachusetts in 1953 and for several years prior thereto a period of five years or more normally elapsed between the entry of a case in the jury court and the actual trial. The public grew dissatisfied. The courts expressed sympathy but could think of no practical remedy. So the chamber of commerce thought of a remedy. A committee, headed by the retired president of Harvard University, Dr. A. Lawrence Lowell, suggested that all motor tort cases (nine tenths of the docket) be referred to "auditors" who would hear the evidence and report their findings to the court. Then, since litigants could not be deprived of their right to a jury, either party could ask for a jury trial and get it. The report of the auditor could be introduced at the trial by either party and be *prima facie* evidence. The courts demurred. How could two trials instead of one shorten the list? Dr. Lowell persisted. The courts resisted. Some of the judges took the chamber's side. Then, possibly more to demonstrate a *reductio ad absurdum* than for any other reason, it was tried. And lo, more than ninety per cent of the auditors' findings were never appealed. The list melted so fast that after seven years it had almost disappeared. *Quod erat demonstrandum.*

Perhaps it is too extreme to say that without an appeal there is no justice, but certainly appeal is an old and valuable part of legal machinery, a safety device that should not be discarded with the easy phrase, "We cannot say that the judge of the trial court was wrong. He saw the witnesses."

Items in Brief

California "Penalty Assessment" Is Unpopular With Judges

California traffic judges are disturbed about a new law which went into effect the first of the year requiring them to collect a "penalty assessment" of one dollar for every twenty-dollar fine, to reimburse the state government for funds used in driver education.

"In my opinion," said Municipal Judge Charles J. Griffin of Beverly Hills, "this is a direct attempt by the state legislature to use the courts as a means of levying taxes. I will enforce the law in my court, but the amount of the fine will take into consideration the added penalty assessment."

The 1954 Awards of Merit

The first place Award of Merit of the American Bar Association for state associations of the first division (the 24 most populous states) went to the Florida Bar Association for its broadscale public relations program, its sponsorship of legal ethic institutes and the streamlining of rules of civil procedure in Florida courts. Honorable mention certificates went to the state bar associations of Illinois, Minnesota and Wisconsin.

Among state associations of the second division (the 24 smaller states) the award went to the State Bar Association of North Dakota, with the Bar Association of the State of Kansas receiving honorable mention.

Office of Coroner Called Outdated

The ancient and often politically coveted office of coroner would disappear from the American scene if all the states adopted a model post-mortem examinations act that was approved recently at a meeting of The National Conference of Commissioners on Uniform State Laws. The Commissioners decided after discussions that began two years ago, that the office of coroner was scientifically out of date in the modern world. It voted, 37 to 0, to recommend the adoption by all state legislatures of a model act drafted

by six prominent organizations. This model law was published in pamphlet form by the National Municipal League in 1951. Copies are still available for 50 cents each from the American Judicature Society or the National Municipal League.

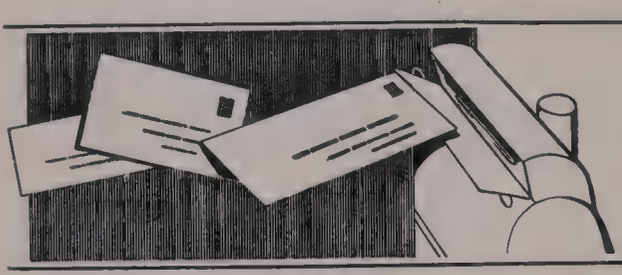
Small Claims Court to Test Night Sessions

Night sessions were started in September in Small Claims Court to enable New York's wage-earners, housewives and shopkeepers to litigate their disputes without loss of time and money from their workaday jobs. Claims up to $100 may be filed in the court which is part of the city Municipal Court and which last year handled 61,000 cases averaging $30 a claim. Mayor Wagner praised the experiment to reduce litigants' costs and said the night sessions were intended to "give many more people the opportunity to seek justice and defend themselves against unjust claims without loss of earnings."

If the test is a success, legislation will be introduced in the state legislature to give official status to the referees. Court attendants, clerks and other personnel are serving without pay so the experiment is not costing the city any extra pay.

New York Appellate Courts Will Try To Cut Cost of Appeals

Experiments to reduce appeal costs were begun September 1st in the eastern upstate area by the Appellate Division, Third Department, of the Supreme Court. In general, the plan will allow a litigant to use a typewriter and a mimeograph to reproduce documents. Expensive printed copies are now required. The plan follows suggestions of the Temporary State Commission on the Courts. New York is one of only twelve states still requiring the printing of briefs and records. The high cost of this system has long been criticized at deterring many persons from pursuing their legal rights. The commission estimates that adoption of simpler reproduction systems for court documents could reduce the cost to litigants in an average case involving a 200-page record from nearly $800 to about $500.



The Reader's Viewpoint

Courtroom Publicity In India

It might interest you to know that through the courtesy of a friend I have recently seen some issues of your nicely got-up journal and have read its contents with avidity. Your exciting presentation of the subjects is creditable inasmuch as you throw quite a light on your system of legal problems in administration which can be profitably read and followed wherever people are interested in law.

As a journalist myself (having worked as Indian representative for many American and English papers and news offices) I greatly liked your articles "A Newspaper Editor Looks at Canon 35" and "The Judge and Courtroom Publicity" in your issue for April 1954. This kind of controversy is possible in a country like America only – we, out in India, look at court proceedings with great respect and the public generally does not look to courts for interesting news and dramatics. No comments and no sob-stuff, etc., is allowed in papers while a case is going on, for we have strict laws while a case is *sub-judice*. Moreover, it is rarely when any newspaper publishes day-to-day proceedings of a case – what is generally done is that extracts from judgments are summarized in papers. We do not look on murders, or enticement cases as so sensational as to be interested in the deposition of witnesses from day-to-day. Political cases against well-known leaders like late Mahatma Gandhi, Pandit Jawaharlal Nehru attracted attention not so much as "cases" but as part of the political struggle that was going on at the time against British rule in India – but then the courts were specially held behind closed doors in jails and there was strict censorship against sensationalism (for fear of riots, etc.) Since the end of British rule we are following British methods for dispensation of justice and our judiciary is independent of the government and its policy, and even where government is party to any case it is treated as an ordinary litigant receiving such criticism as any party of a case would get in similar circumstances.

My own feeling is that court's dignity can be maintained – and not when you hold it with a battery of cameras and microphones and other publicity arrangements to satisfy the news-hungry appetite of subscribers of television, etc., which happily have not yet come to India.

You are at liberty to publish the whole or part of it in your paper.

I shall be grateful if you send me a copy of your journal regularly.

With greetings,

MUNSHI KANMAIYALAL

Advocate High Court
"Krishnakunj" Panchkoshi
Samita Road,
Allahabad 3, India

Court Rules Should Not Be Made by Legislatures

I have just finished reading the addresses recently given at a meeting of the American Judicature Society by Hon. Philbrick McCoy and Mr. N. R. Howard, upon the highly controversial subject of making photographs and electrical recordings in courtrooms during the progress of trials, and broadcasting and telecasting the proceedings. Though I am by no means addicted to the practice of writing "letters to the editor", I find myself unable to resist writing a few comments upon this matter.

First, I wish to express satisfaction that the Society has seen fit to afford an opportunity for a full statement of each side of this controversy, in which the press, or that segment of it which is demanding, as a matter of constitutional right, that its representatives be

allowed to invade halls of justice and create an atmosphere of excitement, tension and embarrassment utterly incompatible with dispassionate search for truth, has had too great an advantage, with its daily facilities for influencing and prejudicing the public mind with spurious pleas for publicity as "education" of the people. So anxious are the "news" venders for sensational material for sales-promoting headlines and stories and television shows that they persistently ignore the essential fact that the courts were never intended to be agencies of public entertainment or, primarily, even of public education, but institutions for the ascertainment of truth and rendition of justice – though undoubtedly courts may and often do, when legitimately resorted to by members of the public, afford opportunities for valuable education in the processes and objectives of our system of justice.

But the able argument of Judge McCoy in defense of the thirty-fifth Canon of Judicial Ethics leaves little or nothing to be added to the case of the bench and bar for orderly quiet and decorum, and a measurably unexcited atmosphere of inquiry into facts, in trials; and certainly Mr. Howard's address pretty thoroughly sums up the opposing and hardly disinterested views of those segments of the press for which he speaks. It is another aspect of the debate, not touched upon by Judge McCoy, probably because he had not anticipated its injection by Mr. Howard, which has especially caught my attention, and which I think calls for special notice.

I refer to Mr. Howard's suggestion that rules for the conduct of trials, regulating the courtroom behavior of strangers to the trial as well as of the judge, jury, counsel and witnesses, including those rules related to the preservation of a judicial atmosphere, should be prescribed by the legislatures instead of the courts. I cannot think of any more pernicious scheme for destroying the independence of the courts and frustrating the proper discharge of their functions. It has taken several generations to restore to the courts a fair measure of their proper authority to make their own rules without stultifying interference by the legislatures, and any such backward step as Mr. Howard proposes would be nothing less than a calamity.

It is easy to understand the motive. Legislators are naturally more susceptible than courts to influence of highly vocal groups such as could easily be led by sensational newspapers to demand the satisfaction of their own hunger for sensation. Though most readers and most radio listeners and television addicts would undoubtedly refrain from exerting pressure upon legislators, there would be many who would exercise no such restraint. When the legislatures take over control of the courts and courtroom conduct, in order to be in a position to gratify the prurient and sadistic curiosity of the most unthinking elements of our people, our constitutional guarantees of fair trial of criminal cases, or dispassionate administration of civil justice in cases involving curiosity-arousing factors, will be well on the way to destruction. If Mr. Howard were to have his way, the most important achievements of the American Bar Association and the state associations, and of their respective committees on judicial administration and legal reform in the last quarter century, in the improvement of our jurisprudence, would be nullified.

I am far from being unappreciative of the value of a free press in a free society, indeed its absolute necessity; but that is far from saying that the press, in order to be "free", must be at liberty to invade the places where sacred and essential functions of free government are being performed, to frustrate the exercise of those functions by exciting, unnerving and humiliating the participants, or by spying out and exposing facts and deliberations whose secrecy, at least temporarily, is essential to the security and welfare of the people for whose interests Mr. Howard professes concern.

If courts, then why not diplomatic conferences, about which no doubt many television fans might be understandably curious? The constitution which they invoke in support of their demands would most certainly never have been formulated and adopted in the convention of 1787 if these ideas of publicity had then prevailed.

LOREN E. SOUERS

1200 Harter Bank Building
Canton 2, Ohio

Juvenile Court vs. Family Court

I have received letters from Mr. George E. Brand and Dean Albert J. Harno in regard to the American Judicature Society membership. I am familiar with the work of the Society and am almost ashamed that I have not joined without the special invitation which was sent to me.

Might I suggest that some attention should be given to the stepchild of the judicial system, at least in Michigan, that is, the probate courts.

Another subject for inquiry would be the question of either a separate juvenile court or a family court. Recently there has been some consideration of combining the juvenile court into a family court and up to the present time I have seen very little discussion of the objections to such a reorganization. It would seem to me that there are objections which should be considered, although their validity might be subject to argument. The main objection I see is that normally in a divorce action, if that is to be handled by a family court, both parents are represented by attorneys, which leaves the child at a disadvantage. Our present system of juvenile courts enables the court to give its full attention to the interests of the child primarily with, of course, due attention to the rights of the parents.

DONALD T. ANDERSON

Judge of Probate
County of Kalamazoo,
Michigan

Status of Past Presidents of State Bar Associations

(Continued from page 85)

West Virginia – No organization. At some recent annual meetings of bar, informal dinners of past presidents, with guest speakers for the meeting, have been held.

Wisconsin – No organization. Meet informally at annual meeting in June.

Wyoming – No organization. Custom has grown up in last six or eight years whereby all of the past presidents meet for dinner at annual meeting, generally at the expense of incumbent president.

The Literature of Judicial Administration

BOOKS

In the midst of the hustle and bustle incident to removal of the American Judicature Society's offices from Ann Arbor to Chicago, we have gotten far behind with our reviews of current books in the field of judicial administration. The review shelf is loaded with interesting-looking volumes that we haven't even had a chance to read, let alone review. Among them we see such titles as *Judge Medina Speaks*, Blaustein and Porter's *The American Lawyer*, and Harrison Tweed's history of the Legal Aid Society of New York, all of which we are anxious to read, together with some more technical works such as *Legislative Drafting* by Reed Dickerson, and the U. S. Children's Bureau's *Standards for Specialized Courts Dealing With Children*. In an early issue after the move, we hope to bring our readers up to date on 1954 publications in this field, including all those mentioned and a great many more.

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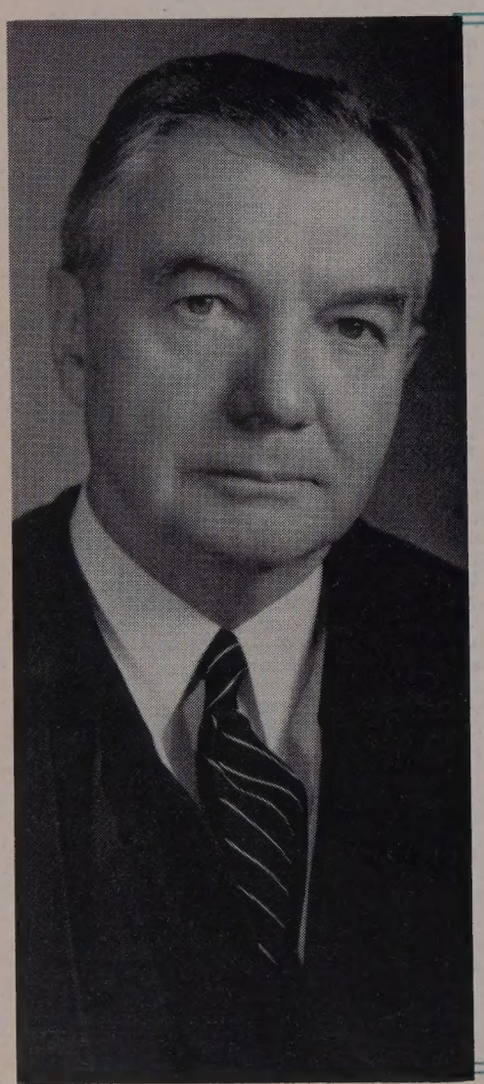

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